No. 88-1

In the Supreme Court of the United States

October Term, 1988

CONSOLIDATED RAIL CORPORATION,
Petitioner

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, et al.,
Respondents

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether Conrail's addition of a drug test to the urinalysis component of its fitness for duty medical examinations gave rise to a minor dispute under the Railway Labor Act where Conrail has had a longstanding, unchallenged practice of performing such medical fitness examinations which have included urinalyses.

PARTIES TO PROCEEDINGS BELOW
AND RULE 28.1 STATEMENT

Petitioner is Consolidated Rail Corporation. Respondents are Railway Labor Executives' Association; American Railway and Airway Supervisors Association, Division of BRAC; American Train Dispatchers Association; Brotherhood of Locomotive Engineers; Brotherhood of Maintenance of Way Employees; Brotherhood of Railroad Signalmen; Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express and Station Employees; Brotherhood Railway Carmen of the United States and Canada; Hotel Employees & Restaurant Employees International Union; International Association of Machinists and Aerospace Workers; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers; International Brotherhood of Electrical Workers; International Brotherhood of Firemen and Oilers; International Longshoremen's Association; National Marine Engineers' Beneficial Association; Seafarers International Union of North America; Sheet Metal Workers International Association; Transport Workers Union of America; and United Transportation Union.

Petitioner has no parent corporation(s). It has the following affiliates and non-wholly-owned subsidiaries:

The Akron & Barberton Belt Railway Company
Albany Port Railway Corporation
American Casualty Excess Insurance, Ltd.
The Belt Railway Company of Chicago
Chicago & Western Indiana Railway Company
Indiana Harbor Belt Railroad Company
Calumet Western Railway Company
The Lakefront Dock and Railroad Terminal Company
The Monongahela Railway Company
Nicholas, Fayette & Greenbrier Railroad Company
Peoria & Pekin Union Railway Company

Pittsburgh Chartiers & Youghiogheny Railway Company
Railroad Association Insurance, Ltd.
Trailer Train
Calpro Company
Railbox Company
Trailer Train Finance, N.V.
Transportation Data Xchange, Inc.

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BRIEF FOR PETITIONER

Petitioner Consolidated Rail Corporation ("Conrail") submits the following brief on the merits pursuant to the Court's grant of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on April 25, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 845 F.2d 1187 (3d Cir. 1988), and is reproduced in the Joint Appendix ("JA") at JA-112 to JA-130. The Order of the United States District Court for the Eastern District of Pennsylvania is unreported and is reproduced in the Joint Appendix at JA-108 to JA-111.

JURISDICTION

Jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1254(1) (1982). The Court granted certiorari to review this matter on October 3, 1988.

STATUTE INVOLVED

Sections 2, 3 and 6 of the Railway Labor Act, 45 U.S.C. §§152, 153 and 156 (1982), are set forth in the Joint Appendix at JA-131 to JA-151.

STATEMENT OF THE CASE

I. Conrail's Fitness For Duty Medical Program.

Since its inception in 1976,[1] Conrail has maintained a fitness for duty medical program, the purpose of which is to determine if employees are medically qualified to perform their jobs safely. Under the program, employees are routinely required to submit to periodic and return-to-duty physical examinations based on age and job classifications,[2] and following furloughs and certain extended absences from work. Periodic physical examinations have been required of certain classifications of

1. Consolidated Rail Corporation was created by the Regional Rail Reorganization Act of 1973, 45 U.S.C. §§701-797m (1987), as a "common carrier by railroad" and not "an agency or instrumentality of the Federal government." 45 U.S.C. §741(b) (1987). Pursuant to the Act, on April 1, 1976 Conrail was conveyed the rail properties of six bankrupt northeast rail carriers including the Penn Central Transportation Company, the Erie Lackawanna Railroad, the Reading Railroad, the Central Railroad of New Jersey, the Lehigh Valley Railway, and portions of the Lehigh & Hudson River Railroad. *See generally* Perritt, *Ask and Ye Shall Receive: The Legislative Response to the Northeast Rail Crisis,* 28 Villanova Law Review 271 (1983).

2. Periodic physical examinations ordinarily are required of employees working in crafts covered by the Hours of Service Act, 45 U.S.C. §§61-64b (1986), and include train and engine crews, yard crews (including switchmen), hostlers, block operators, dispatchers and signalmen. Conrail employees not covered by the Hours of Service Act but who are required to submit to periodic and return-to-duty physical examinations include road foremen of engines, trainmasters, crane or derrick operators, machine operators, highway vehicle operators, inspection and repair foremen and police officers. (JA-73 to JA-75).

employees every three years up to and including the age of 50 and every two years thereafter.[3] (JA-73). Return-to-duty physical examinations are required of train and engine service employees who have been out of service for at least 30 days due to furlough, leave, suspension or similar causes. All other employees who have been out of service for at least 90 days are also required to undergo physical examinations upon returning to duty. (JA-74 to JA-75). Return-to-duty follow-up examinations are within the discretion of Conrail's Department of Health Services which determines whether an employee's condition justifies requiring further examinations to evaluate his or her continuing fitness to work after a return-to-duty. (JA-74).

Since at least 1976, Conrail has, without any bargaining or request to bargain by the Respondent unions (hereinafter "Unions"), unilaterally established, modified and changed its medical fitness standards including the diagnostic screening techniques which have been utilized in medical examinations conducted pursuant to those standards. Such changes have, for example, been in response to advances in medical science and reflect significant improvements in the development of diagnostic techniques.[4] These medical examinations have

3. There are certain exceptions to this rule. The state of New Jersey for example requires annual periodic examinations of locomotive engineers. Conrail has also required operators of over-the-highway vehicles to be examined every two years, and employees engaged in the preparation or serving of food, division superintendents and supervisors in the Systems Operations Bureau to be examined annually. (JA-73 to JA-75).

4. For example, for many years Conrail's Medical Department relied upon the voice of the examining physician to conduct employee hearing tests. The Department changed its procedures to provide for the use of audiometers to conduct such tests. The Medical Department now uses spirometric examinations to measure lung capacity using computers rather than the calibrated bellows which were used by railroads in the past. (JA-67). Conrail

routinely included a urinalysis for albumin and blood sugar. However, a portion of the urine sample was also tested for the presence of illicit drugs when, in the judgment of the examining physician, the employee may have been using drugs or when the employee had been previously taken out of service for a drug-related problem. (JA-69). Each employee whose urine was to be screened for the presence of drugs was always told before providing a urine specimen that such testing would be conducted. (JA-39).

Since 1976,[5] employees who have undergone a

NOTES *(Continued)*
has also revised its techniques for conducting electrocardiograms and visual examinations based on advances in medical technology. These modifications have been made without any consultation with the Unions. (JA-67).

5. While the historical focus of this litigation begins with the creation of Conrail in 1976, medical examinations and fitness for duty requirements have a long history in the railroad industry. *See* International Congress on Hygiene and Demography, "Prevention of Accidents, Examination, Education, and Care of Employees of Common Carriers" in *Transactions*, Vol. 5 pt. 1, 1912, pp. 141-45 Wash., DC, GPO 1913; *Minneapolis St. Paul & Sault Ste. Marie Ry. v. Rock*, 279 U.S. 410, 414 (1929)("Petitioner had a right to require applicants for work on its railroad to pass appropriate physical examinations."); *Baker v. United Transp. Union*, 455 F.2d 149 (3d Cir. 1971)(involving the railroad's right to move the location of physical examinations). In recent years, the Federal Railroad Administration ("FRA") has discussed the importance of including drug tests as part of fitness for duty determinations. Further, the FRA has noted that "regular inclusion of drug screens (including a check for alcohol) could powerfully augment the diagnostic tools available to examining physicians and focus the attention of physicians on signs of abuse that, standing alone, might not be adequate to support a diagnosis. That is, a positive test could be used as a part of the overall medical evaluation." Department of Transportation, Federal Railroad Administration, Control of Alcohol and Drug Use in Railroad Operations, 49 Fed. Reg. 24,252 at 24,279 (proposed June 12, 1984). On November 21, 1988, the Department of Transportation issued regulations governing drug testing of employees involved in the railroad, airline and trucking industries. In

periodic, return-to-duty or follow-up physical examination and who have failed to meet Conrail's established medical standards have been routinely held out of service without pay until the condition has been corrected or eliminated. Thus, for example, employees have been disqualified from service until their vision was corrected or their blood pressure or elevated blood sugar reduced in order to meet the standards set by the Conrail Medical Department. (JA-70).

On April 1, 1984 Conrail issued a new Medical Standards Manual which provided that a drug screen would be included as part of the urinalysis component of all periodic, return-to-duty and follow-up medical examinations. (JA-69). The policy was openly applied in Conrail's Eastern Region (one of four operating regions) for a six-month period but discontinued for budgetary reasons. (JA-69). Thereafter, Conrail returned to its original policy of including drug screens as part of the urinalysis at the discretion of the examining physician.

The heightened importance of medical fitness for duty determinations was brought tragically to national attention by the incident which occurred at Chase, Maryland on January 4, 1987 when an Amtrak passenger train collided with Conrail locomotives killing 16 persons and injuring 174 others. The subsequent determination that the Conrail engineer and brakeman had been using marijuana prior to the accident caused Conrail to focus critical attention on its medical fitness for duty examinations.[6] Shortly thereafter, on February

discussing its regulations on random testing of covered railroad employees, the FRA noted: "[a]ll major railroads have medical examination programs and there is considerable merit to inclusion of drug screens, particularly in a return-to-work context." Department of Transportation, Federal Railroad Administration, Random Drug Testing; Amendments to Alcohol/Drug Regulations, 53 Fed. Reg. 47,102 at 47,119 (1988).

6. After an extensive investigation following the Chase accident, the National Transportation Safety Board concluded that it

20, 1987, Conrail announced that a drug screen would be conducted on urine samples collected as part of all periodic, return-to-duty and follow-up physical examinations. Under the policy, employees who test positive for illegal drugs are medically disqualified from performing service but may return to work by providing a negative drug test at any time within a 45-day period from the date of disqualification. (JA-70). In addition, an employee whose first test is positive is given an opportunity to be evaluated by Conrail's Employee Counseling Service. If the evaluation reveals evidence of possible addiction and the employee agrees to enter an approved treatment program, he or she is given an extended period of 125 days to provide a negative drug test. (JA-70).

Separate and distinct from medical fitness for duty determinations, Conrail has always enforced a disciplinary rule known as "Rule G" which prohibits the use or possession of "intoxicants, narcotics, amphetamines or hallucinogens" by employees on duty or the use of such

NOTES *(Continued)*

had been caused by the engineer's use of marijuana. Department of Transportation, Federal Railroad Administration, Railroad Operating Rules; Random Drug Testing Program, 53 Fed. Reg. 16,640 (proposed May 10, 1988). Dramatic evidence of the tragic consequences of drug and alcohol abuse in the railroad industry is recited in the Brief of the Department of Transportation in *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575 (9th Cir.) *cert. granted*, U.S. 108 S.Ct. 2033 (1988), and the petition for writ of certiorari in *Brotherhood of Locomotive Engineers v. Burlington Northern R.R.*, 838 F.2d 1087 (9th Cir. 1988), *petition for cert. filed* (U.S. April 1, 1988) (No. 87-1631). The FRA has noted that it has ". . . long encouraged railroads to test employees (for drugs) in the context of its medical qualification programs. . . ." Department of Transportation, Federal Railroad Administration, Railroad Operating Rules; Random Drug Testing Program, 53 Fed. Reg. at 16,647. *See also* Department of Transportation, Federal Railroad Administration, Random Drug Testing; Amendments to Alcohol-/Drug Regulations, 53 Fed. Reg. 47,102-47,105 (1988).

substances by employees subject to duty. The Rule further requires employees under medication to be certain that such use will not affect the safe performance of their duties. Conrail does not use drug screening urinalysis to enforce Rule G. Rather, it has traditionally relied upon two methods of detecting Rule G violations: supervisory observation and encouraging employees who are suspected of substance abuse to voluntarily agree to undergo blood or urine tests. A violation of Rule G results in automatic discipline. (JA-51 to JA-52). This is to be contrasted with medical disqualifications based on a positive drug test which do not result in discipline unless the employee subsequently fails or refuses to abide by instructions of the Medical Department.[7]

II. Decisions of the Courts Below.

On May 7, 1986, the Unions filed suit in the United States District Court for the Eastern District of Pennsylvania seeking to enjoin Conrail from utilizing drug screens as part of the urinalysis component of its medical fitness for duty examinations. Although they claimed that the addition of the drug screens violated the Railway Labor Act ("RLA"), the Unions never served Conrail with a notice seeking to bargain over the addition of the drug screen.

Based on a joint stipulation of the parties and uncontradicted facts in the form of affidavits, answers to interrogatories and responses to requests for production of documents, the district court rejected the Unions' contention that the addition of a drug test to the urinalysis component of Conrail's existing medical examination program constituted a "new" policy which required Conrail to bargain with the Unions prior to its implementation. In its order dismissing the complaint,

7. *See, e.g., Railway Labor Executives' Ass'n v. Norfolk & Western Ry.*, 833 F.2d 700, 707-08 (7th Cir. 1987).

the district court noted that Conrail had always required all hourly employees to undergo periodic and return-to-duty physical examinations including urinalyses, and that drug tests had in the past been used by Conrail where drug use was suspected or where prior drug problems existed. (JA-109). The district court found that the Unions had acquiesced in Conrail's procedures to ensure an employee's fitness for the job because the Unions had always recognized Conrail's right under the medical policy to remove from service employees who were unable to perform their duties safely. (JA-109 to JA-110). The district court also found that Conrail's drug testing program was simply a "further refinement" of that practice and was consistent with its right to ensure the safety of its operations. (JA-110). On the basis of these findings, the district court held that Conrail's position regarding the addition of the drug screen was arguably justified by its past practice related to fitness for duty determinations and therefore gave rise to a "minor" dispute under the Railway Labor Act. (JA-110).

On appeal, the United States Court of Appeals for the Third Circuit reversed the district court and remanded the case for further proceedings consistent with its opinion. (JA-130). The Third Circuit recognized that two prior cases, *Railway Labor Executives' Ass'n v. Norfolk & Western Ry.*, 833 F.2d 700 (7th Cir. 1987) and *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern R.R.*, 802 F.2d 1016 (8th Cir. 1986), both dealing with facts virtually identical to those presented in this case, had concluded that they presented "minor disputes" subject to the exclusive jurisdiction of the National Railroad Adjustment Board ("NRAB"). Nevertheless, the Third Circuit concluded that "the absence of any uniformity in interpretation by the other courts reinforces our responsibility to make an independent analysis of the applicable law to the undisputed facts." (JA-125).

Although it concluded that Conrail's past practice of establishing and changing fitness for duty standards and medical examinations constituted an undisputed, implied-in-fact contractual term (JA-121), the Third Circuit required Conrail to show the existence of an express agreement on the drug testing issue. The Third Circuit therefore announced that the standard to be applied in determining a minor dispute was, "[w]hen a court holds that an existing agreement, explicit or implied, arguably justifies a new practice, the court has determined that it is plausible to believe that there was in fact a meeting of the parties' minds on the general issue." (JA-125).

In holding that this case presented a major dispute, the Third Circuit found that ". . . Conrail cannot point to any existing agreement between the parties on such crucial matters as the drug test to be used, the methods of confirming positive results and the confidentiality protections to be employed. We search the past practices of the parties in vain for any indication of an agreement on these key matters. It follows that the agreement governing prior medical examinations cannot be strained to include, even arguably, an agreement to routinely perform a drug screen." (Citations omitted) (JA-128).

On the basis of the above, the Third Circuit concluded that the addition of a drug screen to the existing urinalysis component of Conrail's medical fitness for duty policy was not "arguably justified" by the prior practice. (JA-129).

SUMMARY OF ARGUMENT

This case questions whether Conrail can continue to implement and maintain medical fitness for duty policies that have for decades been a critical component of the safe operation of the railroads and airlines. There is no dispute between the Unions and Conrail that drug

testing is a serious problem in the transportation industry and that employees who are found to be using drugs and/or alcohol are not fit to perform their jobs safely. After years of establishing and changing, without union objection, medical fitness for duty standards and the diagnostic tests used in medical examinations conducted pursuant to those standards, Conrail added a drug screen to the existing urinalysis component of its medical examination. In response, the Unions instituted suit claiming that the drug screen was a new term of employment and that its implementation gave rise to a "major" dispute which required Conrail to bargain about the drug screen's implementation. Despite undisputed evidence showing that Conrail has always had the prerogative of establishing, and from time to time changing, the contents of its medical examinations, including requiring drug testing at the discretion of the examining physician, the Court of Appeals for the Third Circuit concluded that Conrail's addition of the drug screen was not "arguably justified" by its prior practice because Conrail could not prove an arguable "meeting of the minds" with the Unions over the issue of drug testing.

1. In view of the congressional purpose underlying the Railway Labor Act – the maintenance of uninterrupted commerce by rail through the peaceful and orderly resolution of disputes – the courts have developed categories of disputes, the character of which determines the manner and forum in which they are to be resolved. The court's limited role under the Railway Labor Act is simply to determine whether disputes are either "major" disputes involving the formation of collective bargaining agreements or efforts to secure them, *Elgin, Joliet & Eastern Ry. v. Burley,* 325 U.S. 711, 722-23 (1945), or "minor" disputes involving grievances or the interpretation or application of rates of pay, rules or working conditions as embodied in existing agreements and the practices of the parties. *Detroit & Toledo*

Shore Line R.R. v. United Transp. Union, 396 U.S. 142, 153-54 (1969). In recognition of the fact that a major dispute can eventuate in a strike, court decisions have long reflected a preference for treating disputes between carriers and unions as "minor disputes" so long as the position of the party claiming the right to take the challenged action "arguably" can be justified by the agreement or past practices, or if its contention is not "obviously insubstantial." *United Transp. Union v. Penn Central Transp. Co.,* 505 F.2d 542, 544 (3d Cir. 1974); *United Transp. Union v. Baker,* 482 F.2d 228, 230 (6th Cir. 1973).

2. The Third Circuit's decision was directly contrary to decisions of both the Seventh and Eighth Circuits in *Railway Labor Executives' Ass'n v. Norfolk & Western Ry.,* 833 F.2d 700 (7th Cir. 1987) and *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern R.R.,* 802 F.2d 1016 (8th Cir. 1986), which held on virtually identical facts that the railroads' addition of a drug screen to the existing urinalysis component of their medical examinations gave rise to "minor" disputes under the Railway Labor Act.

3. The Third Circuit fundamentally misapplied the standard for identifying minor disputes. The court acknowledged that the past practice between Conrail and the Unions recognized Conrail's unilateral right to establish and change fitness for duty standards including physical examinations. Nevertheless, the court held that its perception of the "consequences" of drug testing and the "ethical and practical dilemmas" which it presented required that there "arguably" be an actual agreement or "meeting of the minds" between Conrail and the Unions related to drug testing.

4. In fashioning this intrusive standard for distinguishing between major and minor disputes, the court below incorporated into this Railway Labor Act case

concepts of "mandatory subject of bargaining" and "clear and unmistakable waiver" developed in a Guideline Memorandum of the General Counsel of the National Labor Relations Board ("NLRB"). By making this application, however, the Third Circuit ignored the plethora of "viable guidelines" available to it in resolving major and minor disputes and failed to rationalize the application of the National Labor Relations Act, as amended, 29 U.S.C. §§151-187 (1973) ("NLRA") to a dispute arising under the RLA. Moreover, the Third Circuit's unsupported incorporation of NLRA principles threatens to undermine the RLA's statutory purpose by diminishing the role of arbitration under the RLA and promoting rather than discouraging economic self-help in the form of strikes.

5. The Third Circuit's misapplication of well-established principles of law developed under the Railway Labor Act has injected substantial confusion into the manner in which courts channel major and minor disputes. This is because the lower court has implied that under certain circumstances courts can exceed their normal judicial role and decide the merits of a labor dispute in place of the NRAB.

6. This Court should therefore correct the Third Circuit's fundamental misapplication of legal principles by reversing that decision and finding that Conrail's addition of a drug test in the context of its fitness for duty medical program gave rise to a minor dispute under the Railway Labor Act.

ARGUMENT

I. CONRAIL'S ADDITION OF A DRUG TEST TO THE URINALYSIS COMPONENT OF ITS FITNESS FOR DUTY MEDICAL EXAMINATIONS GAVE RISE TO A MINOR DISPUTE.

A. The Development Of Major And Minor Dispute Procedures Reinforces The Congressional Intent To Assure Effective Resolution Of Controversies While Avoiding Interruptions To Commerce.

In enacting the Railway Labor Act of 1926,[8] Congress imposed on both railroads and employees the obligation to settle disputes without strikes or other self-help.[9] This was in direct recognition of the critical national importance of uninterrupted commerce by rail which the RLA was designed to protect.[10] The RLA itself is designed to provide for the prompt and orderly settlement of both fundamental contractual disputes and of grievances between unions and management, and in so doing channels economic forces "into special processes intended to compromise them." *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30, 41 (1957).

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8. 44 Stat. 577, significantly amended in 1934, 48 Stat. 1185, codified at 45 U.S.C. §§151-188 (1982).

9. Section 2 First of the RLA creates a statutory duty of management and labor to settle disputes and avoid interruptions of operations. 45 U.S.C. §152 First. *Chicago & North Western Ry. v. United Transp. Union*, 402 U.S. 570 (1971).

10. "[F]ollowing decades of labor unrest that persistently revealed the shortcomings of every legislative attempt to address the problems, representatives of railroad labor and management created a system for dispute resolution that Congress enacted as the RLA." *See Burlington Northern R.R. v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429, 107 S.Ct. 1841, 1850 (1987).

The RLA provides mechanisms for two distinct types of disputes: "major" disputes, which involve contract formation, amendment or acquisition of new rights; and "minor" disputes, which involve grievances over the interpretation or application of an existing agreement. Both of these categories are "sharply distinguished." *Elgin, Joliet & Eastern Ry. v. Burley,* 325 U.S. at 722-23 (1945); *See also Brotherhood of Locomotive Engineers v. Burlington Northern R.R.,* 838 F.2d 1087, 1090 (9th Cir. 1988), *petition for cert. filed* (U.S. April 1, 1988)(No. 87-1631).[11]

In major disputes the controversy relates to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past. *Elgin, Joliet & Eastern Ry. v. Burley,* 325 U.S. at 723. The procedures under the RLA for resolving major disputes contemplate use of an extensive mediation and conciliation mechanism and require the parties to attempt to resolve such disputes through negotiation, mediation and possible presidential intervention. *See Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.,* 394 U.S. 369, 378 (1969); *Detroit & Toledo Shore Line R.R. v. United Transp. Union,* 396 U.S. at 148-50. The procedures of the RLA are purposely long and drawn out, based on the hope that over time reason and practical considerations will catalyze an agreement. *Brotherhood of Railway and Steamship Clerks v. Florida East Coast Ry.,* 384 U.S. 238, 246 (1966). Coupled with this extensive bargaining duty of both parties is the obligation to maintain the status quo[12] until the collective bargaining process has

11. The terms "major" and "minor" disputes do not appear in the RLA, but are the product of judicial decisions. *See Elgin, Joliet & Eastern Ry. v. Burley,* 325 U.S. at 723-24.

12. Sections 5, 6 and 10 of the RLA (45 U.S.C. §§155 First, 156 and 160) require that no changes be made in rates of pay, rules or working conditions until the major dispute processes of the RLA have been completed.

been exhausted, a process which has been described by the Court as "almost interminable." *Detroit & Toledo Shore Line R.R. v. United Transp. Union,* 396 U.S. at 149, 150-53. The purpose of these exhaustive requirements is that if a major dispute cannot be resolved, the union then has the right to resort to self-help in support of its position. *Id.; Burlington Northern R.R. v. Brotherhood of Maintenance of Way Employees,* 481 U.S. 429, 107 S.Ct. 1841, 1851 (1987).

By contrast, "minor disputes" contemplate the existence of established rates of pay, rules or working conditions, or at any rate, a situation in which no effort is made to bring about a formal change in these terms of employment or to create new ones. "The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. . . . [T]he claim is to rights accrued, not merely to have new ones created for the future." *Elgin, Joliet & Eastern Ry. v. Burley,* 325 U.S. at 723.[13] The resolution of minor disputes is brought about through a formal statutory grievance process that culminates in binding arbitration by the National Railroad Adjustment Board ("NRAB"), 45 U.S.C. §153.[14] If a grievance is resolvable under this process the union does not have a right to strike. *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R.,* 353 U.S. 30 (1957).

13. The "omitted case" refers to rights firmly grounded in past practice or prior courses of dealing and can include a situation "arguably within the scope of residual managerial prerogative left with the [carrier] by the agreement." *Airline Flight Attendants v. Texas Int'l Airlines, Inc.,* 411 F. Supp. 954, 959 (S.D. Tex. 1976), *aff'd mem.,* 566 F.2d 104 (5th Cir. 1978), *citing United Industrial Workers of Seafarers' Int'l Union v. Board of Trustees of Galveston Wharves,* 351 F.2d 183, 188 (5th Cir. 1965). *See also Railway Labor Executives' Ass'n v. Atchison, Topeka & Santa Fe Ry.,* 430 F.2d 994, 996-97 (9th Cir. 1970), *cert. denied,* 400 U.S. 1021 (1971).

14. The National Railroad Adjustment Board, which was created by the RLA, provides for 34 members, composed equally of

The court's role in deciding if a particular dispute is minor or major is crucial because it determines the manner in which a federal court may support the resolution procedure established by Congress. *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern R.R.*, 802 F.2d 1016, 1021 (8th Cir. 1986). If a dispute is found to be major and can ultimately result in self-help by either side, including potential disruption to the national rail or air[15] transportation systems, the status quo must be identified to provide stability for the collective bargaining process. The court has jurisdiction to enforce the status quo while bargaining occurs. Preservation of the status quo is thought to facilitate the collective bargaining process. *See Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. at 150. Federal courts have broad powers to enjoin unilateral actions by either side. This responsibility requires a threshold determination of the content of the prevailing rates of pay, rules or working

NOTES *(Continued)*
representatives of carriers and labor organizations, empowered to select neutral members to sit on the Board. 45 U.S.C. §153 First (a) and (l). The RLA also provides for the creation of "system" and "regional" boards of adjustment, 45 U.S.C. §153 Second, paragraph 1, as well as public law boards, identified in the Railway Labor Act as "special boards of adjustment," 45 U.S.C. §153 Second, paragraph 2. Each of these has exclusive jurisdiction to resolve minor disputes comparable to the exclusive jurisdiction of the Adjustment Board. *See generally Employees Protective Ass'n v. Norfolk & Western Ry.*, 511 F.2d 1040, 1044 (4th Cir. 1975). The NRAB or any Public Law Board may order a wide panoply of remedies including reinstatement and "the payment of money" to compensate an employee for sums of money to which he might be entitled. 45 U.S.C. §153 First (o). Standards for judicial review of Adjustment Board decisions are "among the narrowest known to the law." *Union Pacific R.R. v. Sheehan*, 439 U.S. 89, 91 (1978).

15. The airline industry is also covered by the Railway Labor Act, 45 U.S.C. §181; *International Ass'n of Machinists v. Central Airlines*, 372 U.S. 682 (1963).

conditions. *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern R.R.*, 802 F.2d at 1021.

However, in minor disputes, the status quo allows the employer to take the disputed action, *Illinois Central R.R. v. Brotherhood of Railroad Trainmen*, 398 F.2d 973, 977 (7th Cir. 1968), but the NRAB has exclusive jurisdiction to decide the dispute. *Andrews v. Louisville and Nashville R.R.*, 406 U.S. 320 (1972). Recognizing that the NRAB is "an agency peculiarly competent" to resolve disputes in the rail industry, Congress "intended to leave a minimum responsibility to the courts." *Order of Railway Conductors v. Pitney*, 326 U.S. 561, 566 (1946); *Slocum v. Delaware Lackawanna & Western R.R.*, 339 U.S. 239, 243 (1950).[16]

Because the judiciary has an inherently more intrusive role in major disputes than in minor disputes, the lower courts have held that the burden of proving a minor dispute is relatively "light." *Maine Central R.R. v. United Transp. Union*, 787 F.2d 780, 783 (1st Cir.), *cert. denied*, 479 U.S. 848 (1986); *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern R.R.*, 802 F.2d at 1022 (referring to the "relatively light" burden which the railroad must bear in showing a minor dispute); *Chicago and North Western Transp. Co. v. Railway Labor Executives' Ass'n*, 855

16. This Court has long recognized the NRAB's special expertise in determining these disputes.

> Congress, in the Railway Labor Act, vested the Adjustment Board with the broad power to arbitrate grievances and plainly intended that interpretation of these controversial provisions should be submitted for the decision of railroad men, both workers and management, serving on the Adjustment Board with their long experience and accepted expertise in this field.

Gunther v. San Diego & Arizona Eastern Ry., 382 U.S. 257, 261-62 (1965). *Accord Transportation-Communication Employees Union v. Union Pacific R.R.*, 385 U.S. 157, 161 (1966).

F.2d 1277, 1283 (7th Cir. 1988), *pet. for cert. filed* (U.S. Sept. 16, 1988) (No. 88-464). In fact, in cases where there is some doubt whether a dispute is a "minor" dispute, it should be treated as "minor" subject to the mandatory and exclusive jurisdiction of the NRAB:

> Since the machinery for resolving major disputes is conciliatory rather than binding, a major dispute can escalate into a strike, which in the transportation industries – producers of a nonstorable service – can be a calamity. So it is no surprise that, when in doubt, the courts construe disputes as minor.

Brotherhood of Locomotive Engineers v. Atchison, Topeka & Santa Fe Ry., 768 F.2d 914, 920 (7th Cir. 1985). *See also Brotherhood Railway Carmen v. Norfolk & Western Ry.*, 745 F.2d 370, 374-75 (6th Cir. 1984); *Railway Labor Executives' Ass'n v. Norfolk & Western Ry.*, 833 F.2d at 705.

A long line of federal cases has recognized that a dispute will be treated as "minor" where the position of the party taking the challenged action can "arguably" be justified by the existing agreement or where the party's position is "even arguable," or is not "frivolous" or "obviously insubstantial."[17]

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17. *See, e.g., Brotherhood of Locomotive Engineers v. Burlington Northern R.R.*, 838 F.2d 1087, 1111 (9th Cir. 1988)("arguably justified"), *petition for cert. filed* (U.S. April 1, 1988)(No. 87-1631); *National Railway Labor Conference v. International Ass'n of Machinists & Aerospace Workers*, 830 F.2d 741, 746 (7th Cir. 1987)(minor unless claim is "frivolous" or "obviously insubstantial"); *Brotherhood of Railroad Signalmen v. Burlington Northern R.R.*, 829 F.2d 617, 619 (7th Cir. 1987)(court must decide whether the asserted contractual defense is "frivolous"); *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern R.R.*, 802 F.2d 1016, 1022 (8th Cir. 1986)("reasonably susceptible" to asserted interpretation); *Maine Central R.R. v. United Transp. Union*, 787 F.2d 780, 782 (1st Cir.)(court's role is limited to determining whether carrier's assertion is "even arguable"), *cert. denied*, 479 U.S. 848 (1986); *Brotherhood Railway Carmen v. Norfolk & Western Ry.*, 745 F.2d 370, 375 (6th Cir. 1984)("arguably justified" or "not obviously insubstantial"); *Air Line Pilots Ass'n, Int'l v. Trans World Airlines, Inc.*, 713 F.2d 940, 948 (2d Cir. 1983)(reasonably susceptible to the argued interpretation or not "obviously insubstantial"), *aff'd in part and rev'd in part on other grounds, sub nom., Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985); *Carbone v. Meserve*, 645 F.2d 96, 99 (1st Cir.)("even arguable"), *cert. denied*, 454 U.S. 859 (1981); *United Transp. Union v. Penn Central Transp. Co.*, 505 F.2d 542, 544 (3d Cir. 1974)("arguably justified"); *International Brotherhood of Elec. Workers v. Washington Terminal Co.*, 473 F.2d 1156, 1173 (D.C. Cir. 1972)("reasonably susceptible" to carrier's contention), *cert. denied*, 411 U.S. 906 (1973); *REA Express v. Brotherhood of Railway, Airline and Steamship Clerks*, 459 F.2d 226, 231 (5th Cir.)(minor dispute if position is "arguable"), *cert. denied*, 409 U.S. 892 (1972).

In determining whether a party's position is "arguably justified" or "even arguable" based on established rates of pay, rules or working conditions, it is not necessary that the term of employment itself be embodied in a written document. Thus, it has been recognized that such terms can be inferred from habit and custom. *Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142 (1969); *Brotherhood of Locomotive Engineers v. Burlington Northern R.R.*, 838 F.2d at 1091-92. Past practice, accepted or acquiesced in by a party, becomes part of the status quo. *Maine Central R.R. v. United Transp. Union*, 787 F.2d at 783. It is the arbitrator's role to review "practice, usage and custom" to determine the existing employment relationship. *Transportation-Communication Employees Union v. Union Pacific R.R.*, 385 U.S. 157, 161 (1966).

An employment term established by past practice and course of dealing becomes legally enforceable when a pattern of conduct is understood or acquiesced in by the other side. *United Transp. Union, Local Lodge No. 31 v. St. Paul Union Depot*, 434 F.2d 220, 222-23 (8th Cir. 1970), *cert. denied*, 401 U.S. 975 (1971). The

parties' rates of pay, rules or working conditions therefore include both the specific terms set forth in written agreements and well-established practices constituting a "course of dealing" between them. *Maine Central R.R. v. United Transp. Union,* 787 F.2d at 782; *accord Brotherhood of Railway, Airline & Steamship Clerks v. Atchison, Topeka and Santa Fe Ry.,* 847 F.2d 403, 406 (7th Cir. 1988).

When a railroad employer takes an action that is not prohibited by a collective bargaining agreement or prior course of conduct, it has not made a change in working conditions that breaches the employer's status quo obligation. The carrier has the right to act and challenges to that action are minor disputes. *See Rutland Ry. v. Brotherhood of Locomotive Engineers,* 307 F.2d 21, 35-36 (2d Cir. 1962) (minor dispute created when railroad unilaterally reduced train runs, even if that action resulted in reduction of jobs, where absence of negotiations between railroad and union over establishment of train runs gave railroad implicit right to determine those runs), *cert. denied,* 372 U.S. 954 (1963); *Baker v. United Transp. Union,* 455 F.2d 149, 151 (3d Cir. 1971)(where a railroad demonstrated a longstanding practice "of freely changing the location of physical and instructional examinations and instructional classes throughout its system without consultation with the union," it could continue to make the changes); *United Transp. Union v. Georgia R.R.,* 452 F.2d 226, 228 (5th Cir. 1971) (railroad's longstanding exercise of its right to determine tie-up or lay-over points without union objection was a matter reserved by practice for the railroad's determination), *cert. denied,* 406 U.S. 919 (1972). Disputes relating to the exercise of acquired or vested rights are therefore minor disputes because the right arises from the parties' labor-management relationship.

B. Conrail's Position Concerning The Addition Of A Drug Test To The Urinalysis Component Of Its Fitness For Duty Medical Examinations Was At Least "Arguably Justified" By Its Longstanding Unchallenged Past Practice And Therefore Gave Rise To A Minor Dispute.

At the outset, there is no disagreement between Conrail and the Unions that there is a "serious drug and alcohol problem in the transportation industry." (JA-129). Indeed, the Unions have publicly stated that they "yield to no one in abhorence [sic] of alcohol or drug use in employment, or in the desire to purge the industry of their adverse effects." (JA-129). In fact, the Unions concede that ". . . one who is using alcohol or drugs should not be working in the railroad system."[18] With respect to examinations related to determining employee fitness, the Unions have since 1976 acquiesced in Conrail's exercise of the unilateral right to both establish and change fitness for duty standards including the removal from service without pay of employees who are determined under those standards to be unfit to safely perform their jobs. (JA-109 to JA-110). In addition, for over ten years, Conrail's physicians have had the critical discretion to utilize drug testing as part of their medical determinations.

Presented with facts virtually identical to those involved in this case, the Seventh and Eighth Circuits recently held that the carriers' addition of a drug screen to an existing urinalysis component of a fitness for duty examination presented "minor" disputes under the RLA. In *Railway Labor Executives' Ass'n v. Norfolk & Western Ry.*, 833 F.2d 700 (7th Cir. 1987) and *Brotherhood*

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18. Transcript of oral argument by Lawrence M. Mann, Esquire, on behalf of the Railway Labor Executives' Association at p. 27, *Burnley v. Railway Labor Executives' Assoc.,* U.S. No. 87-1555.

of Maintenance of Way Employees, Lodge 16 v. Burlington Northern R.R., 802 F.2d 1016 (8th Cir. 1986), the courts found that in view of the railroads' longstanding practices of making independent medical fitness for duty determinations without any bargaining or request to bargain by the unions, the addition of a drug screen to the existing urinalysis component of those determinations was arguably justified by the parties' practices. Both courts found that because the underlying purpose of the medical examinations – to determine fitness for duty – remained the same before and after the drug screen was added, the addition of a drug screen was simply an additional refinement in order to predict safe employee performance. Therefore the railroads' positions were found to be "arguably justified" by the prior practice and it was for the NRAB to definitively determine the working conditions that prevailed.

In *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern R.R.*, 802 F.2d 1016 (8th Cir. 1986), it was undisputed that for many years the Burlington Northern Railroad ("BN") had an unchallenged practice of requiring employees to submit to periodic and comprehensive medical examinations in order to ensure all employees were fit for duty. Further, both the BN and the union agreed that the railroad had the right to ensure the safety of its operations by removing from service employees who were unable to perform their duties safely. 802 F.2d at 1024. The Eighth Circuit concluded that the basis of the controversy was the extent to which the existing urinalysis component of a physical examination could be further refined in order to predict safe employee performance. While recognizing that the BN's addition of the drug screen was a new technique, the court nevertheless found that the underlying purpose of the unchallenged medical policy – to ensure all BN employees were fit for duty – remained unchanged. Characterizing the drug

screen as "nothing more than a method designed to detect the presence of a newly emerging threat to that fitness," the court stated that it should come as no surprise to the union that the components of a work fitness medical examination would "change with the times." 802 F.2d at 1024. In view of these findings, the Eighth Circuit concluded that the BN's addition of the drug screen was "arguably justified" by its prior practice and objectives and therefore the dispute should be submitted to the NRAB. *Id.*

In the Seventh Circuit case, *Railway Labor Executives' Ass'n v. Norfolk & Western Ry.*, 833 F.2d 700 (7th Cir. 1987) the Norfolk & Western railroad ("N&W") for a number of years had required employees to undergo certain routine medical examinations, both periodically and upon return-to-duty after certain extended absences. The purpose of these examinations was to ensure that employees were physically fit for their jobs. Similar to the practices undertaken by the BN and Conrail, the N&W had always had the unchallenged prerogative of determining fitness for duty standards and the content of all examinations related to those standards. 833 F.2d at 702. Urine specimens designed to detect the presence of albumin and blood sugar were a regular part of the physical examinations. After several years, the N&W began requiring that these urine samples also be tested for evidence of drug use. If the samples revealed the presence of drugs, employees were held out of service unless they could provide a drug free sample within 45 days. Failure to provide a clean sample within the 45 day period would result in the employee's dismissal for failure to obey instructions. In the alternative, N&W employees who tested positive for drugs could elect to participate in the railroad's employee assistance program and, under the program, the employee would be given an extended period of time to provide a drug-free sample. 833 F.2d at 702-03.

The Seventh Circuit found that the past practice had been to accord the N&W unilateral authority to determine the appropriate tests to conduct during required medical examinations. Therefore, the court concluded that the N&W's prerogatives to conduct routine medical examinations were part of an implied agreement congruent with those past practices that had become a "course of dealing" between N&W and the employees. 833 F.2d at 705-06. In reaching its decision that the union's challenge to the addition of the drug screen gave rise to a minor dispute, the Seventh Circuit cautioned: "We are not deciding that N&W's drug testing program is justified by its agreement with the unions. The NRAB, not this court, has exclusive jurisdiction to decide the merits of this case. We merely hold that N&W's argument that the parties' agreement justifies its drug testing program is not frivolous or obviously insubstantial." 833 F.2d at 707 (citations omitted).

These cases illustrate the low threshold in determining the NRAB's exclusive jurisdiction. That threshold precludes the court from deciding not only the ultimate merits of the issues, but also the scope of the relevant practice. If any reasonably articulated past practice could sustain the carrier's position, its resolution should be left to the NRAB.

The facts involved in this case are equally as compelling as those on which the Seventh and Eighth Circuits concluded that the BN's and the N&W's additions of drug screens constituted minor disputes. Conrail has had a longstanding, unchallenged practice of unilaterally establishing fitness for duty medical standards and related physical examinations (JA-110) which both the Unions and Conrail agree are designed to ensure employee fitness for their jobs. (JA-110). Employees found unfit for duty have always been subject to being removed from service without pay and are not returned

to duty until they are deemed fit by the Medical Department. Similar to both the BN and N&W, Conrail has required physical examinations for a number of years on a periodic and return-to-duty basis and has altered and amended the components of these examinations from time to time without any bargaining or request to bargain by the Unions. The components of these examinations have always included urinalyses for albumin and blood sugar and, without any objection by the Unions, have included drug screens when warranted in the judgment of the examining physician. [19] Moreover, beginning in 1984, Conrail actually required as part of its medical program that all physical examinations include a drug screen urinalysis. This program was enforced in the entire Eastern Region of Conrail for a period of six months. The purpose of Conrail's medical policy — to determine employees' fitness for duty — has not changed since 1976 and was not changed by the addition of the drug screen component in 1987.

Conrail's longstanding practice of establishing and changing medical standards related to employees' fitness for duty has evolved through the exercise by Conrail's Medical Department of the unchallenged prerogative of determining when employees are medically fit to safely perform their jobs. The addition of a drug screen to the existing urinalysis component of fitness for duty medical examinations represents an important diagnostic improvement in the detection and treatment of drug and alcohol abuse problems in the transportation industry. Where, as here, the Unions have never objected to Conrail's exercise of discretion in determining fitness for duty issues, Conrail's position that the addition of the drug screen, which is clearly related to

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19. It is undisputed that since 1976 employees whose urine was to be tested for the presence of drugs were always told before they provided a urine specimen that such testing would be conducted. (JA-39).

determinations of fitness, is at least arguably justified by the parties' prior practice. Therefore, this dispute concerning whether the drug screen was actually warranted by the prior practice between Conrail and the Unions is within the exclusive jurisdiction of the NRAB.

II. IN DETERMINING THAT CONRAIL'S ADDITION OF A DRUG TEST GAVE RISE TO A MAJOR DISPUTE, THE THIRD CIRCUIT FUNDAMENTALLY MISAPPLIED WELL-SETTLED STANDARDS DEVELOPED UNDER THE RAILWAY LABOR ACT.

The Third Circuit's conclusion that Conrail's addition of the drug test constituted a major dispute under the RLA stands in sharp contrast to the decisions of the Seventh and Eighth Circuits on virtually identical facts. While the Third Circuit's analysis, considered superficially, may appear to follow prior precedent under the RLA, a careful review of the opinion shows that the court fundamentally misapplied well-settled principles of law and actually created a new standard by incorporating into its analysis three erroneous legal requirements. First, the Third Circuit mistakenly required Conrail to demonstrate that it ". . . is plausible to believe that there was in fact a meeting of the parties' minds" related to drug testing. (JA-125). Second, rather than acknowledging the significance of Conrail's longstanding, unchallenged practice of establishing and revising its fitness for duty medical standards, the Third Circuit chose to base its determination on the potential consequences of drug tests and the "controversial" nature of drug testing in general. Finally, the Third Circuit required Conrail to demonstrate the existence of an agreement related to drug testing which satisfied the concepts of "mandatory subject of bargaining" and "clear and unmistakable waiver" developed under the NLRA as embodied in a Guideline Memorandum of the NLRB's General Counsel. Therefore, the Third Circuit's finding

of a major dispute in this case was the direct result of its fundamental misapplication of the law through the creation of its own standard for determining minor disputes.

A. Conrail's Position That The Addition Of A Drug Test Gave Rise To A "Minor Dispute" Did Not Require It To Show The Existence Of A Prior "Meeting Of The Minds" On Drug Testing.

While correctly identifying the standard to be applied in determining the existence of a minor dispute, i.e., whether the disputed action could "arguably" be justified by the parties' existing practices and course of dealing, or whether the contention that the parties' prior practice sanctioned the disputed action was not "obviously insubstantial" (JA-120), the Third Circuit proceeded to misapply this test. In so doing, the court actually fashioned a new standard:

> When a court holds that an existing agreement, explicit or implied, arguably justifies a new practice, the court has determined that it is plausible to believe that there was in fact a meeting of the parties' minds on the general issue.

(JA-125).

The Third Circuit's formulation of this new standard, which is a complete departure from settled law, led directly to its mistaken conclusion that Conrail's addition of the drug screen created a major dispute under the RLA. Adherence to this new standard thus caused the lower court to ignore the parties' past practice related to fitness for duty medical examinations and to discount Conrail's prior drug testing as arising only on "particularized cause." (JA-126). Thus, the Third Circuit required Conrail to prove either an actual agreement on

drug testing or a past practice of "across-the-board" drug testing.[20] (JA-128).

The standard created by the court placed it in the improper role of deciding the merits of the parties' underlying dispute. *Union Pacific R.R. v. Sheehan,* 439 U.S. 89, 94 (1978); *Maine Central R.R. v. United Transp. Union,* 787 F.2d at 783; *see also* cases cited at p. 17, *supra.* By requiring Conrail to demonstrate the existence of an express agreement on the specific question of the use of drug testing in fitness for duty medical examinations, the court both defined and circumscribed the scope of the relevant past practice. In so doing, it decided important issues which were clearly reserved for the statutorily mandated arbitration process. *See, e.g.,* National Railroad Adjustment Board Award 23334 (1982)(JA-82 to JA-107) (NRAB had jurisdiction to decide whether railroad's unilateral implementation of intoxilyzers in support of Rule G enforcement program was consistent with prior custom and practice between carrier and union).[21]

The Third Circuit's requirement that Conrail demonstrate a "meeting of the minds" over the issue of drug testing thus forced Conrail into the untenable position of having to prove an actual agreement with the Unions

20. For example, the Third Circuit observed that "Conrail cannot point to any existing agreement between the parties on such crucial matters as the drug test to be used, the methods of confirming positive results, and the confidentiality protections to be employed. We search the past practices of the parties in vain for any indication of an agreement on these key matters." (JA-128) (citations omitted). The record is devoid of evidence that the Unions ever sought bargaining over the drug testing techniques and protocols related to such examinations.

21. The opinion of the NRAB was originally attached to the RLEA's reply to Conrail's motion for summary judgment in the district court below and is now included as part of the Joint Appendix. (JA-82 to JA-107).

over precisely what it believed it had the right to do in the first place. Had Conrail satisfied this unique burden, there could have been no dispute with the Unions over the addition of the drug screen. The Third Circuit exceeded its proper role by precluding the NRAB from determining whether Conrail's longstanding, unchallenged prerogative of establishing and maintaining all fitness for duty standards actually justified the drug screen.

B. The Addition Of A Drug Test Did Not Give Rise To A Major Dispute Because Of The "Controversial" Nature Or "Consequences" Of Drug Testing.

Although claiming that it was not reaching the issue of whether Conrail's addition of a drug screen to its existing urinalysis constituted an extension of disciplinary Rule G, the Third Circuit stated that the issue before it was whether the expansion of drug screening as part of fitness for duty examinations was arguably justified by Conrail's medical policy or Rule G. (JA-121; JA-129). Despite this formulation, the Third Circuit's decision required Conrail to demonstrate not only that the drug screen was arguably justified by its prior practice related to medical fitness determinations, but also that it complied with the past practice related to enforcement of Rule G. Accordingly, the Third Circuit observed that if it were to hold that the inclusion of a drug screen was arguably justified by the medical policy, "it would expand the scope and effect of medical testing beyond that of Rule G, the disciplinary rule aimed specifically at substance abuse." (JA-126 to JA-127).

The court thus focused its attention on what it perceived to be the disciplinary impact of the addition of the drug screen component to the existing urinalysis. By so doing, the court shifted its attention away from the issue of whether the addition of the drug screen was

even arguably based on the parties' practice, and focused instead on the impact of that practice.[22] However, minor disputes are not determined by their impact. *Hilbert v. Pennsylvania R.R.*, 290 F.2d 881, 885 (7th Cir.) ("a major dispute does not depend on the number of people involved"), *cert. denied*, 368 U.S. 900 (1961). "Since the distinction between the two [major versus minor disputes] is based on whether or not there is a non-frivolous argument that reference to a collective bargaining agreement will resolve the dispute, it seems unlikely that the magnitude of the actual impact of the disputed practice can change the characterization of the dispute." *National Railway Labor Conference v. International Ass'n of Machinists and Aerospace Workers*, 830 F.2d 741, 747 n. 5 (7th Cir. 1987).

In addition to focusing on the perceived disciplinary aspects of the addition of the drug screen, the Third Circuit emphasized the controversial nature of drug testing. It rejected Conrail's argument that drug testing was to be treated the same as testing urine for blood sugar and other physical conditions, stating that "[t]his [argument] ignores considerable differences in what is tested for and the consequences thereof. Employee drug testing is a controversial issue throughout the railroad industry and beyond. The practice poses serious ethical and practical dilemmas as well." (JA-127) (citations omitted).[23]

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22. The Third Circuit's characterization of the physician's medical judgment of possible drug use as "particularized cause" evidences its mistaken belief that such determinations were synonymous with supervisory observations of suspected drug use under Rule G. Such analysis would suggest that in order to perform an electrocardiogram or test for albumin the examining physician must have particularized cause to believe that a person has heart disease or kidney disease.

23. With one exception, all of the cases cited by the Third Circuit to demonstrate the controversial nature of drug testing involved constitutional challenges under the Fourth Amendment.

The Third Circuit's concern with the impact of drug testing and its controversial nature caused it to define the parties' practices and to intrude upon the NRAB's jurisdiction by determining Conrail's rights. However, the fact that the disputed issue in this case involves drug testing, an issue of recognized national importance, does not lessen the policy considerations favoring a finding of a minor dispute under the Railway Labor Act, nor does it justify judicial intervention into issues exclusively within the province of the NRAB.

C. The Existence Of A Minor Dispute Is Not To Be Determined By Application Of Principles Of Law Developed Under The National Labor Relations Act As Embodied In A Guideline Memorandum Of The NLRB's General Counsel.

The Third Circuit's error is both compounded and revealed by its ultimate reliance upon principles derived under the NLRA. Specifically, the court below found "particularly significant" a Guideline Memorandum prepared by the General Counsel of the NLRB. NLRB General Counsel Memo 87-5, 4 Lab. L. Rep. (CCH) ¶9344 (1987).[24]

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24. In addition to the Third Circuit, the Fifth Circuit has also recently fallen into the trap of viewing the two statutes as coextensive. In *International Brotherhood of Teamsters v. Southwest Airlines Co.*, 842 F.2d 794, *reh'g granted*, 853 F.2d 283 (5th Cir. 1988), the Fifth Circuit, in a confusing opinion which applied standards for determining mandatory subjects of bargaining under the NLRA to a case arising under the RLA, held that Southwest's use of drug testing to enforce Rule G constituted a "mandatory subject of bargaining" under the RLA. Further compounding the confusion, the court held that the union had not clearly and unmistakably waived its right to bargain over drug testing. Finally, relying in part on the "Guideline Memorandum" prepared by the NLRB General Counsel, the court concluded that Southwest's drug testing program created a "major" dispute. However, that decision

The Third Circuit's application of the NLRB General Counsel's unreviewed legal opinion to the statutory structure established under the RLA was wholly unwarranted and contributed to the Third Circuit's erroneous minor dispute analysis. By applying NLRA concepts to the instant case, the court below totally ignored the fundamental policy reasons underlying the RLA's unique method of resolving disputes, "techniques [that are] peculiar to [the railroad] industry." *California v. Taylor*, 353 U.S. 553, 566 (1957). The court thereby injected confusion into established case precedents developed under each of these statutory schemes.

This Court has emphasized repeatedly that "the National Labor Relations Act cannot be imported wholesale into the railway labor arena," due to the fundamental differences between the RLA and the NLRA. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383-84 (1969). This is particularly true where, as here, the disputed issue under the two statutes involves the specific statutory mechanism for resolving labor disputes. *Chicago & North Western Ry. v. United Transp. Union*, 402 U.S. 570, 579 n.11 (1971); *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 686-87 n.23 (1981).[25]

NOTES *(Continued)*
has now been vacated by the granting of rehearing *en banc* by the Fifth Circuit. *See* 5th Cir. R. 35. At least two district courts have relied heavily upon the General Counsel's Guideline Memorandum in deciding RLA issues similar to those raised in the instant case. *Railway Labor Executives' Ass'n v. Port Authority Trans-Hudson Corp.*, 695 F. Supp. 124 (S.D.N.Y. 1988); *Railway Labor Executives' Ass'n v. National Railroad Passenger Corp.*, 691 F. Supp. 1516 (D.D.C. 1988), *appeal filed*, No. 88-7189 (D.C. Cir. Aug. 8, 1988).

25. In *Communications Workers of America v. Beck*, U.S., , 108 S. Ct. 2641 (1988), the Court recently affirmed that analogies between the RLA and NLRA are appropriate only after undertaking a painstaking review of the statutory language, legislative history, congressional intent and institutional history under both statutes. Although Justices Blackmun, O'Connor and Scalia

Ignoring prior guidance from this Court regarding cross-application of principles under the RLA and NLRA, as well as its own precedent,[26] the Third Circuit incorporated the "position" of the NLRB's General Counsel. In so doing, the court below failed to follow this Court's admonition that NLRA analysis may be applied to the RLA only in the absence of "viable guidelines" under the RLA. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. at 391. Clearly, there is an abundance of RLA guidelines concerning major and minor disputes.[27]

Moreover, had the Third Circuit investigated the two statutes it would have found considerable differences between those statutes which would have precluded the application of NLRA principles to this case. Among the most fundamental differences between the two statutes are those involving the distinctive burdens imposed on the employer before allowing unilateral action and the separate approaches to the resolution of labor disputes. The General Counsel's Guideline Memorandum accurately states the principle under the

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disagreed with the majority's analysis of the legislative history of the two statutes, they concurred with the majority that "the scope of the RLA is not identical to that of the NLRA and that courts should be wary of drawing parallels between the two statutes." 108 S. Ct. at 2664, *citing First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 and *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969).

26. *See Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie R.R.*, 845 F.2d 420, 429-30 (3d Cir. 1988), *petition for cert. filed* (U.S. May 17, 1988) (No. 87-3797).

27. Appendix C to the Brief for Respondents in Opposition to the petition for writ of certiorari in *Chicago and North Western Transp. Co. v. Railway Labor Executives' Ass'n*, 855 F.2d 1277 (7th Cir. 1988), *petition for cert. filed* (U.S. Sept. 16, 1988) (No. 88-464), now pending before this Court, lists some 50 cases, decided by ten different circuits, in which the "arguably" standard has been adopted and applied. *See also* cases cited at n. 17, p. 18.

NLRA that "any waiver by the union of [the NLRA's] statutory right to bargain . . . by . . . past practice or by inaction, is not to be lightly inferred and must be 'clear and unmistakable.' " 4 Lab. L. Rep. (CCH) ¶9344 at 19,203. *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983); *NLRB v. Jacobs Mfg. Co.*, 196 F.2d 680 (2d Cir. 1952); *The Press Co.*, 121 N.L.R.B. 976 (1958). Thus, under the NLRA, a heavy burden is placed on the employer to demonstrate the union's waiver of its statutory right to bargain collectively. This reflects the lack of statutory mechanisms for resolving collective bargaining disputes other than through the use of economic force in the form of strikes. Under the NLRA, the National Labor Relations Board is required to make a definitive decision with respect to the rights of the parties. If the NLRB finds a waiver of the right to bargain, the union is foreclosed from raising the issue until the expiration of the existing agreement.[28]

By contrast, the Railway Labor Act, grounded in the congressional policy of preventing interruption of commerce, establishes a statutory grievance process which includes binding arbitration by the NRAB. 45 U.S.C. §153. Because of the presence of this principal dispute resolution mechanism, the RLA does not include either a counterpart to the NLRB or an express role for the courts. The courts' decisions under the RLA have been sensitive to the importance of arbitration and have not interfered in the exclusive jurisdiction of the NRAB. Thus, the RLA has evolved to impose on an employer

28. *See, e.g., The Press Company*, 121 N.L.R.B. 976 (1958), one of the earliest cases announcing the clear and unmistakable waiver doctrine. In that case, the Board held that relieving the employer of the requirement to demonstrate that the union clearly and unmistakably waived its interest in bargaining over a particular subject would increase the likelihood of confrontation, either at the bargaining table or by forcing the union to resort to strikes. 121 N.L.R.B. at 978.

only the relatively light burden of demonstrating that its actions are arguably justified by the parties' collective bargaining relationship. If this minimal threshold is met, the statute requires that the matter be resolved through binding arbitration, without resorting to economic self-help in the form of strikes. *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30 (1957); *Brotherhood of Locomotive Engineers v. Louisville & Nashville R.R.*, 373 U.S. 33 (1963).

By uncritically incorporating NLRA concepts of "mandatory subject of bargaining" and "clear and unmistakable waiver" into this RLA dispute, the Third Circuit ignored the RLA's statutory scheme which provides a special mechanism for channeling disputes and favors their peaceful resolution. Applying NLRA principles, the Third Circuit concluded that, because Conrail could not point to an express agreement between the parties on the subject of drug testing, its addition of a drug screen to its existing urinalysis created a major dispute under the RLA. (JA-128). Requiring a railroad employer to prove the existence of an express contractual agreement or a clear and unmistakable waiver by a union arrogates the task of the NRAB of defining the practices of the parties and the working conditions that mark the employment relationship. Although an intrusive waiver standard may be appropriate for determining bargaining obligations under the NLRA, this approach is out of step with the RLA's statutory scheme of requiring disputes to be resolved by non-judicial forums that understand the context of the parties' relationship.

Even assuming that principles developed under the NLRA have any application to the instant dispute, the General Counsel's Guideline Memorandum does not constitute precedent under the NLRA, and therefore the

Third Circuit's reliance on it was misplaced.[29] While the General Counsel has final authority regarding the filing, investigation and prosecution of unfair labor practice charges, only the National Labor Relations Board has final agency authority with respect to the adjudication of complaints. 29 U.S.C. §153(d); *NLRB v. United Food and Commercial Workers Union, Local 23,* U.S. , 108 S.Ct. 413 (1987). A decision by the General Counsel to issue a complaint is merely "the necessary first step to trigger the Board's adjudicatory authority. However, until a hearing is held the Board has taken no action; no *adjudication* has yet taken place." *NLRB v. United Food and Commercial Workers Union, Local 23,* 108 S. Ct. at 422 (emphasis in original). *See also NLRB v. Sears Roebuck & Co.*, 421 U.S. 132 (1975)(Advice and Appeals Memoranda discussing the reasons for filing a complaint are not final opinions of an administrative agency).

The Third Circuit's adoption of NLRA principles as embodied in the NLRB General Counsel's Guideline Memorandum evidences its recognition of the need to look beyond legal precedent developed under the Railway Labor Act in order to justify its analysis in this case. The Third Circuit's unsupported integration of concepts developed under these different statutory schemes threatens to inject considerable confusion into a well-settled area of law.

29. As the Third Circuit recognized, the General Counsel's Memorandum reflects only her "position" concerning the question of whether drug screening constitutes a mandatory subject of bargaining under the NLRA. (JA-127). Apparently recognizing her limited statutory authority, the General Counsel stated in her memorandum that, with respect to the issue of whether drug testing of applicants for employment is a mandatory subject of bargaining, "I have authorized complaints on this issue in order to place the question before the Board." 4 Lab. L. Rep. (CCH) ¶9344 at 19,202. Moreover, the General Counsel's opinion has not been, and cannot be, subject to judicial review until such time as the NLRB has decided a case evaluating the General Counsel's theory. *NLRB v. United Food and Commercial Workers Union, Local 23,* U.S. , 108 S.Ct. 413, 425 (1987); *Hanna Mining Co. v. District 2, Marine Engineers Beneficial Ass'n,* 382 U.S. 181, 192 (1965).

The growing problem of drug and alcohol abuse in the transportation industry is well-documented in submissions to this Court and recent federal regulations. The parties to this litigation fundamentally agree that employees using drugs should not be working in the railroad industry. In 1987, recognizing that the magnitude of the drug problem demanded a more proactive response, Conrail undertook reasonable measures to increase the ability of its Medical Department to make fitness for duty determinations. By so doing, Conrail did not change the existing ground rules governing medical standards or physical examinations required of its employees.

Under well-settled principles of law recognizing the limited role of federal courts in channeling rather than deciding RLA disputes, the Unions' challenge to Conrail's actions should be resolved in the arbitration process. Guidance from this Court is necessary as to the proper standard to be applied in determining that this case presents a minor dispute. This guidance will prevent the lower court from undermining the statutory scheme of the Railway Labor Act and from arrogating the arbitration function which the statute plainly places with the NRAB.

CONCLUSION

For all of the reasons stated above, Petitioner Consolidated Rail Corporation requests that the judgment of the court below be reversed.

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